Nos. 03-1116, 03-1120

Supreme Court, U.S.
FILED
SEP 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, et al.,

Petitioners,

v.

ELEANOR HEALD, et al.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, et al.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CARGO AIRLINE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DREW S. DAYS, III
Counsel of Record
BETH S. BRINKMANN
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

Of Counsel

STEPHEN A. ALTERMAN
MYERS & ALTERMAN
1220 19th Street, NW
Washington, DC 20036

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

Counsel for Amicus Curiae

SEPTEMBER 23, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

A. The FAAAA, As An Exercise Of Congress's Authority Under The Interstate Commerce Clause, Preempts State Laws That Regulate The Prices, Routes, Or Services Of Carriers Of Property, Including Laws That Regulate Deliveries Of Alcohol 8

1. Congress Enacted The FAAAA To Eliminate A Patchwork Of State Laws Regulating Carriers That It Determined Unreasonably Burdened Interstate Commerce 9

2. Michigan's Regulation Of Carriers' Deliveries Is Preempted By The FAAAA 14

3. The Twenty-first Amendment Does Not Limit Congress's Authority To Enact Federal Statutes, Such As The FAAAA, Under Its Commerce Clause Authority 17

B. State Laws That Regulate Deliveries Of Alcohol By Interstate Carriers Can Violate The Dormant Commerce Clause's Proscription Against Local Laws That Unduly Burden The Interstate Movement Of Goods 23

1. The Twenty-first Amendment Does Not Authorize Enforcement Of State Laws That Otherwise Violate The Dormant Commerce Clause 24

TABLE OF CONTENTS – Continued

Page

2. State Laws Regulating Deliveries Of Alcohol Impede The Development And Functioning Of A National Market, And May Place An Undue Burden On Interstate Movement Of Goods 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999) 17

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 7, 15

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 8

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 5, 25

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 27

Boynton v. Virginia, 364 U.S. 454 (1960) 8

Brown v. General Services Admin., 425 U.S. 820 (1976) 13

California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997) 13

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 3, 18, 19

Capital Cities Cable v. Crisp, 467 U.S. 691 (1984) 3, 4, 9, 19, 20

Case of State Freight Tax, 82 U.S. (15 Wall.) 232 (1873) 26

City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424 (2002) 14, 15

Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 25

TABLE OF AUTHORITIES – Continued

Page

Federal Express v. California PUC, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992) 17

Forman v. Federal Express Corp., 753 N.Y.S.2d 348 (N.Y. Civ. Ct. 2003) 15

Fry v. United States, 421 U.S. 542 (1975) 9

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 23

Gregory v. Ashcroft, 501 U.S. 452 (1991) 19

Healy v. Beer Inst., 491 U.S. 324 (1989) 5, 25

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 18

Hughes v. Oklahoma, 441 U.S. 322 (1979) 26

Hughes Air Corp. v. Public Utilities Comm'n, 644 F.2d 1334 (9th Cir. 1981) 10

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 27

Kelley v. United States, 69 F.3d 1503 (10th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996) 17

Louisville & Nashville R.R. v. F.W. Cook Brewing Co., 223 U.S. 70 (1912) 26

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 13

North Dakota v. United States, 495 U.S. 423 (1990) 20

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 14

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 24

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 29

TABLE OF AUTHORITIES – Continued

Page

Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) 27, 29

Rockwell v. United-Parcel Serv., Inc., No. 99-CV-57, 1999 U.S. Dist. LEXIS 22036 (D. Vt. July 7, 1999) 15

Soly v. United Parcel Serv., Inc., No. 02-CV-10499-MEL, 2002 U.S. Dist. LEXIS 24059 (D. Mass. Aug. 22, 2002) 15

Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) 27

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) ... 3, 18, 19, 22

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001) 15

Trujillo v. American Airlines, Inc., 938 F. Supp. 392 (N.D. Tex. 1995), *aff'd mem.*, 98 F.3d 1338 (5th Cir. 1996) 16

United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323 (1st Cir. 2003) 15, 16, 17

United Parcel Serv., Inc. v. Flores-Galarza, No. 03-1990, 2004 U.S. App. LEXIS 19370 (1st Cir. Sept. 14, 2004) 14

United States v. State Tax Comm'n of Miss., 412 U.S. 363 (1973) 20

Wabash, St. Louis and Pacific Railway Co. v. Illinois, 118 U.S. 557 (1886) 9, 27

William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939) 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

U.S. Const.:
art. I 3, 18, 23
art. I, § 8, cl. 3 (Commerce Clause) ..... *passim*
art. VI, cl. 2 (Supremacy Clause) 19
amend. XXI ..... *passim*
amend. XXI, § 2 ..... 5, 17

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ..... 3, 10, 13

Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973 10

Federal Alcohol Administration Act, Act of Aug. 29, 1935, ch. 814, tit. I, 49 Stat. 977 18

Federal Aviation Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 ..... *passim*

Interstate Commerce Act, Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 9

Motor Carrier Act of 1935, Pub. L. No. 255, 49 Stat. 543 9

Pub. L. No. 107-273, 116 Stat. 1758 (2002) 21

18 U.S.C. § 1716(f) 21

27 U.S.C.
§ 122 25
§ 124 ..... 4, 21, 25
§ 201 *et seq.* 18

TABLE OF AUTHORITIES – Continued

Page

§ 203 7

§ 205 7

49 U.S.C.

§ 13102(21)(B) 15

§ 14501(c)(1) 8, 12

§ 14501(c)(2) 14

§ 40101(a)(6) 7

§ 40101(b)(2) 7

§ 41101(a) 7

§ 41103(c) 7

§ 41109(a)(2)(A) 7

§ 41109(a)(2)(B) 7

§ 41712 7

§ 41713(b)(1) 13

§ 41713(b)(4)(A) 8, 12

§ 41713(b)(4)(B) 14

Alaska Stat. § 04.11.499 28

Colo. Rev. Stat. § 12-47-901(l) 28

Fla. Stat. ch. 561.545(2) 28

Me. Rev. Stat. Ann. tit. 28, § 2077-B 28

Mich. Comp. Laws

§ 436.1203(1) 6, 28

§ 436.1203(4) 6

§ 436.1203(8)(f) 6

TABLE OF AUTHORITIES – Continued

Page

§ 436.1701(1) 6

§ 436.1909 6

Miss. Code Ann. § 27-71-315 28

N.H. Rev. Stat. Ann. § 178:27(II) 28

N.Y. Alco. Bev. Cont. § 102(d) 6, 28

Tenn. Code Ann. § 57-3-402(b) 28

MISCELLANEOUS MATERIALS

76 Cong. Rec. (1933)

4138 22

4141 22

4144 23

4177-4178 22

4219 22

4220 22

4225 23

148 Cong. Rec. H6749 (daily ed. Sept. 26, 2002) 21

Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (2003) 7

H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715 ..... 10, 11, 12, 13, 16

Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp., 103d Cong., 2d Sess. (1994) 11

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, U.S. Dep't of Commerce, *2002 Economic Census: Transportation: 2002 Commodity Flow Survey: United States (Preliminary)* (2003) 1

INTEREST OF *AMICUS CURIAE*

The Cargo Airline Association (CAA) is a trade association of fifteen interstate air carriers and motor carriers affiliated with air carriers through common controlling interest, including United Parcel Service and FedEx Express, which transport only cargo.[1]

Cargo transportation is the engine that drives the nation's interstate commerce. It is critically important to the economy. As of the last economic census, for-hire air and motor carriers transported more than 3.6 billion tons of goods, valued in excess of $4 trillion. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *2002 Economic Census: Transportation: 2002 Commodity Flow Survey: United States (Preliminary)*, at 8 tbl. 1a (2003).

Carriers are able to provide the timely, efficient, and reliable service on which the modern economy relies only by employing uniform processes for handling, transporting, and delivering packages. It is therefore critical to the effective functioning of carriers' delivery operations that those operations be subject to uniform, national laws throughout the United States, as Congress has directed in the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607. *Amicus* CAA's members, and their customers, bear the burdens of divergent state laws that seek to regulate carriers' delivery of specific items.

---

[1] A letter from the parties consenting to the filing of this brief has been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Michigan laws at issue in these cases, and the New York laws at issue in *Swedenburg v. Kelly*, No. 03-1274, directly regulate carriers' deliveries. Because *amicus* CAA's members depend on nationally-uniform rules in operating their businesses, the CAA has a significant interest in the outcome of these cases.

SUMMARY OF ARGUMENT

The state laws at issue in these cases regulate not only the buyers and sellers of wine, but also the carriers that transport the wine, along with other goods, to and within Michigan. These laws directly regulate carriers by proscribing delivery of alcohol to unauthorized recipients. The parties apparently assume that the federal rights of carriers are derivative of and coextensive with those of the buyers and sellers. But that assumption is in error. Carriers have been afforded special protection from state regulation by federal statute, as well as under this Court's Commerce Clause jurisprudence.

Although the Michigan laws regulating carriers at issue in these cases are invalid, many of *amicus* CAA's members offer shippers the option of requiring an adult signature for delivery. Moreover, the federal government remains available to address any untoward conduct by carriers.

A. The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607, is critical to the proper resolution of these cases. The FAAAA preempts state laws "related to a price, route, or service" of air and motor carriers that transport property. The judgment below should be affirmed on the ground that the Michigan laws at issue are preempted by the FAAAA.

Congress enacted the FAAAA to reaffirm and expand its earlier preemption of state laws regulating air carriers in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. Congress enacted the FAAAA's preemption provisions because it determined that the existing patchwork of state regulation of carrier operations "imposed an unreasonable burden on interstate commerce." FAAAA § 601(a)(1), 108 Stat. at 1605.

The FAAAA preempts Michigan's laws regulating carriers' deliveries. A carrier's delivery of the property it transports is a core part of the carrier's "service," which cannot be regulated by state or other local laws. The state laws also relate to a carrier's routes because compliance requires special routing of packages containing alcohol, including re-routing of non-complying packages to be returned to shippers, and may require changes to delivery drivers' routes to account for the increased amount of time necessary to conform to restrictions on the manner of deliveries. Finally, these laws relate to a carrier's prices because the costs of compliance can substantially increase the costs for carriers to transport and deliver goods.

The Twenty-first Amendment does not invalidate the FAAAA. Congress enacted the FAAAA's preemption provisions pursuant to its Article I power to regulate interstate commerce. This Court has held in three cases that federal statutes enacted pursuant to the Commerce Clause preempted state laws regarding alcohol despite claims by the States that the Twenty-first Amendment authorized the laws. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984). While there is language in these cases that suggests the Court was seeking to "balance" federal and state interests, this balance appears no different from standard application of the

Supremacy Clause, in which the federal government must prevail. Certainly, if, as in *Crisp*, a federal policy in favor of access to cable television can trump a State's interest in promoting temperance, then a federal policy in favor of unfettered national commercial markets for the transportation of property likewise must supercede state laws that are motivated by a combination of temperance and economic protectionism. To hold otherwise would draw into question not only the FAAAA, but also other federal laws, such as recently enacted public-safety legislation designed to reduce the number of bulky packages that passengers carry onto airplanes by authorizing the direct shipment of on-site purchases of wine to consumers who could have lawfully carried the wine into the State. *See* 27 U.S.C. § 124.

Nothing in the Twenty-first Amendment's legislative history reflects an intent to limit Congress's authority to regulate commerce pursuant to the Commerce Clause. To the contrary, the debates show that Congress's rejection of a proposed Section 3 of the Amendment, which would have granted it express authority to regulate the sale of liquor on the premises where sold, was based in part on the understanding that Congress's existing authority to regulate liquor under the Commerce Clause was not affected.

B. If the Court does not reach the FAAAA preemption argument, the judgment below should be affirmed on respondents' claim that the Michigan laws' facial discrimination against out-of-state products falls within the Dormant Commerce Clause's virtually *per se* rule of invalidity. Moreover, claims under the Dormant Commerce Clause involving undue burdens on interstate commerce should not be foreclosed in cases such as these involving state regulation of the delivery of alcohol.

This Court has never adopted the view, urged by petitioners, that state laws regarding the transportation of

liquor can never be invalidated under the Dormant Commerce Clause, regardless of the burden on interstate commerce. To the contrary, this Court has held that nothing in the text of Section 2 of the Twenty-first Amendment exempts state laws from Dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Healy v. Beer Inst.*, 491 U.S. 324 (1989). The Court should not retreat from these holdings.

Even if this Court were to reject respondents' claims of unconstitutional discriminatory treatment, serious questions would remain concerning the constitutionality of the burden that state laws regulating deliveries of alcohol impose on interstate carriers under the Dormant Commerce Clause. This Court has long recognized that the Clause's proscription against economic balkanization is often violated by state laws directly regulating interstate carriers' transportation of property, a determination confirmed by Congress in enacting the FAAAA.

Michigan's laws can impede the flow of interstate commerce because they disrupt carriers' operations, increase costs, and slow service. Several States forbid carriers from making certain deliveries of alcohol either to unauthorized recipients or from unlicensed shippers, with the determination of who is unauthorized or unlicensed varying among the States. The inefficiencies and delays caused by such state laws may constitute an undue burden on interstate commerce in violation of the Commerce Clause that could not be sustained unless supported by important state interests that justify the burden. Nothing in the Twenty-first Amendment requires this Court to sanction unlimited balkanization of the national market when the product being carried is alcohol.

ARGUMENT

Petitioners, Michigan state officials and a trade association of Michigan beer and wine wholesalers, ask this Court to uphold state laws that regulate not only the buyers and sellers of wine, but also directly regulate carriers (including trucks and aircraft) that transport the wine, along with other goods, to and within Michigan. The Michigan laws restrict the "delivery" of alcohol to state licensees and forbid "delivery" to an individual under most circumstances. Mich. Comp. Laws § 436.1203(1). Even when they do allow direct delivery to individuals, the laws require "[t]he person who delivers the alcoholic liquor" to "verify that the individual accepting delivery is of legal age" through a "diligent inquiry," which is defined to include "at least an examination of an official Michigan" drivers' license or identification card "or any other bona fide picture identification which establishes the identity and age of the person." Mich. Comp. Laws § 436.1203(4), (8)(f). The laws are enforced through criminal penalties against delivery persons and others. *See* Mich. Comp. Laws §§ 436.1909, 436.1701(1).

The New York state laws that are before the Court in the companion case consolidated for argument, *Swedenburg v. Kelly*, No. 03-1274, likewise directly regulate carriers by forbidding a "common carrier or other person" from "bring[ing] or carry[ing] into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." N.Y. Alco. Bev. Cont. § 102(d).

The constitutional challenge in this action was brought by persons who wish to buy wine from sellers outside of their State and the out-of-state sellers who wish to sell and ship directly to those persons. None of the parties addresses the carriers who transport the wine from the sellers to the buyers, or the provisions of the

challenged state laws that directly regulate carriers' deliveries of wine purchased from the out-of-state sellers. The parties apparently assume that the federal rights of carriers are derivative of and coextensive with those of the buyer and seller. But that assumption is in error. Carriers have been afforded special protection from state regulation by federal statute, as well as under this Court's Commerce Clause jurisprudence.

Although the Michigan laws regulating carriers at issue in these cases are invalid, many of *amicus* CAA's members offer shippers the option of requiring an adult signature for delivery. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 36-37 (2003).

Moreover, the federal government remains available to address any untoward conduct by carriers. Despite broad federal deregulation, air carriers must obtain from the federal government a certificate authorizing air transportation before providing interstate cargo service. *See* 49 U.S.C. § 41101(a). The federal government may impose such terms on the certificate as are in the public interest, *see id.* §§ 41103(c), 41109(a)(2)(A), with certain exceptions regarding pricing, scheduling, destinations, and the like, *see id.* §§ 41103(c), 41109(a)(2)(B); *see also id.* § 40101(a)(6), (b)(2) (describing the deregulatory market-based purposes government must consider in assessing the public interest). The federal government has also established an administrative mechanism to police "unfair" or "deceptive" practices by air carriers while allowing them to engage in interstate commerce governed by national rules. *See* 49 U.S.C. § 41712; *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 n.4 (1995).[2]

---

[2] The federal government also regulates those entities that produce and ship alcohol. *See* 27 U.S.C. §§ 203, 205. Accordingly, the States need not regulate the carriers that transport and deliver the shipments

(Continued on following page)

A. The FAAAA, As An Exercise Of Congress's Authority Under The Interstate Commerce Clause, Preempts State Laws That Regulate The Prices, Routes, Or Services Of Carriers Of Property, Including Laws That Regulate Deliveries Of Alcohol

Federal law exclusively governs carriers' transportation of property by land and air in both interstate and intrastate commerce. Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607, to create and encourage an efficient and competitive national market for the transportation of goods. The FAAAA preempts state laws related to the prices, routes, or services of air carriers, motor carriers, and intermodal carriers (*i.e.*, carriers that use a combination of both air and motor transportation) that transport property. *See* 49 U.S.C. §§ 41713(b)(4)(A), 14501(c)(1). The FAAAA is critical to the proper resolution of these cases because it reflects Congress's determination that States should be divested of virtually all authority to regulate the commercial transportation of property, including the deliveries of wine purportedly regulated by the state laws at issue in these cases. The judgment below should be affirmed on the ground that the Michigan laws at issue are preempted by the FAAAA.[3]

---

because the federal government already regulates the terms upon which entities are permitted to ship alcohol and can adjust such regulation to address other concerns.

[3] Although the parties did not raise this statutory preemption argument below, this Court has the authority to consider it. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983). Indeed, it is particularly appropriate to address the statutory preemption argument because the question presented involves the Dormant Commerce Clause and "the relationship between legislative and judicial enforcement of the Commerce Clause is close." *Ibid.*; *see also Boynton v. Virginia*, 364 U.S. 454, 457 (1960) (electing to

(Continued on following page)

1. Congress Enacted The FAAAA To Eliminate A Patchwork Of State Laws Regulating Carriers That It Determined Unreasonably Burdened Interstate Commerce

Congress's decision in the FAAAA to preempt state regulation of the prices, routes, and services of air, motor, and intermodal carriers of property is rooted in a long history of federal supremacy in this field. Starting with the creation of the Interstate Commerce Commission (ICC) in 1887, *see* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, the federal government has been responsible for regulating the prices, routes, and services of the interstate carriage of goods, to the exclusion of state authorities.[4]

---

resolve case based on federal preemption claim not raised by petitioner rather than the Dormant Commerce Clause claim upon which *certiorari* had been granted). Moreover, by addressing the statutory question, this Court may not need to address the constitutional issue of the interplay between the Twenty-first Amendment and the Dormant Commerce Clause. *See Fry v. United States*, 421 U.S. 542, 546 (1975) (addressing statutory issues raised in *amicus* briefs but not by petitioner "rather than decide a constitutional question").

This Court adopted a similar course in *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), where, at the urging of an *amicus*, it declined to address a First Amendment claim regarding state regulation of alcohol advertising on cable television resolved by the court of appeals and raised by petitioners in their petition for *certiorari*. The Court instead disposed of the case against petitioners on statutory preemption grounds, even though it was not passed upon by the lower courts and even though the Court was required to address the scope of the Twenty-first Amendment in doing so. *Id.* at 697.

[4] Congress created the ICC to regulate railroads in response to this Court's decision in *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), which held that a state law that attempted to regulate the intrastate portion of a railroad's transportation of goods intended for another State violated the Dormant Commerce Clause. The ICC statute was extended in 1935 to apply to trucks and other interstate motor carriers transporting property for compensation. *See* Motor Carrier Act of 1935, Pub. L. No. 255, § 217, 49 Stat. 543, 560-561. A similarly exclusive federal regulatory regime was later established for

(Continued on following page)

Over time, Congress favored less regulation of air and motor carriers of property, determining that interstate commerce would be more efficient if transportation of goods was governed primarily by competition in the marketplace. Therefore, by 1978, Congress had eliminated most federal regulation of air transportation, and had freed air carriers, including air cargo carriers, from state regulation of *intrastate* price, routes, and services. *See* Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, §§ 4, 37(a), 40(a), 92 Stat. 1705, 1707-1708, 1741, 1744-1745; *Hughes Air Corp. v. Public Utilities Comm'n*, 644 F.2d 1334, 1341 (9th Cir. 1981).

Although Congress had also substantially deregulated interstate motor carriers of property, state regulation of intrastate ground transportation initially remained in place after the ADA. In 1994, however, Congress determined that it was necessary to extend express preemption of state laws related to the prices, routes, or services of carriers engaged in the intrastate transportation of property, whether by ground, air, or some combination thereof, because of the adverse effects such state laws had on interstate commerce. As explained by the Conference Committee Report accompanying the FAAAA, the U.S. Department of Transportation had estimated that state regulation imposed costs of $3 to $8 billion a year on motor carriers and the public. H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. State regulation of carrier operations that had survived ADA preemption "cause[d] significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." *Ibid.*

---

air carriers traveling between States. *See* Civil Aeronautics Act of 1938, Pub. L. No. 706, § 403(a), 52 Stat. 973, 992-993 (authorizing regulation of interstate air carriers by the Civil Aeronautics Authority).

Moreover, the different rules governing interstate and intrastate deliveries created perverse incentives for shipping goods across state lines and then back into the State of origin simply to avoid state regulation. *Id.* at 87-88.

The state laws also directly interfered with interstate commerce because the "sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Id.* at 87.[5] Preemption was thus "necessary to facilitate interstate commerce" by eliminating the "patchwork of regulation" that state laws imposed on carriers transporting property. *Ibid.* Congress made express statutory findings in enacting the FAAAA that "the regulation of intrastate transportation of property by the States has – (A) imposed an unreasonable burden on interstate commerce; [and] (B) impeded the free flow of trade, traffic,

[5] *See, e.g., Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.*, 103d Cong., 2d Sess. 21 (1994) (testimony of Frank E. Kruesi, Asst. Sec., U.S. Department of Transportation) ("This is a national problem. We all bear the national expense because we purchase goods made by regional, national, and multi-national companies located in States that regulate trucking."); *ibid.* ("The very diversity of 41 [state] regulatory schemes is an additional problem for national and regional carriers which try to conduct a standard way of doing business. The States are known as the Laboratories of Democracy, but this is a case where the laboratories are not helpful to the economic well-being of our country."); *id.* at 122-123 (testimony of James A. Rogers, Vice-President, United Parcel Service) ("How big a problem is State regulation for a company like UPS? It is a big problem. * * * If we want to offer our customers a new service, we have to go to 38 PUCs in 38 different States to get them to approve the service. Every time we file one of these applications, we are at risk that they might order us to present more evidence at a hearing, [and] block service until they make a decision. We end up with a checker board map of States where some we can offer service, some we can't, and we confuse ourselves and we very much confuse our shippers.").

and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. at 1605.

In response to these findings, Congress concluded that "certain aspects of the State regulatory process should be preempted." *Id.* § 601(a)(2), 108 Stat. at 1605. Congress thus enacted statutory provisions in the FAAAA preempting state regulation of the transportation of property by all motor carriers, air carriers, and intermodal carriers. For example, Section 601(b) of the FAAAA provides:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

49 U.S.C. § 41713(b)(4)(A).[6]

---

[6] Section 601(c) similarly preempts state laws "related to a price, route, or service of any motor carrier [not affiliated with a direct air carrier] * * * with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Because the preemption language in Section 601(c) regarding motor carriers is identical to that discussed in the text in Section 601(b) regarding air and affiliated carriers, and because *amicus* CAA's members are all air carriers or motor carriers affiliated with air carriers, for ease of reference we refer only to Section 601(b) in discussing the FAAAA's preemptive scope. As the text of the provision demonstrates, however, Section 601(c) has comparable preemptive scope for motor carriers. *See also* H.R. Conf. Rep. No. 103-677, at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757 (FAAAA's two preemption provisions "intended to function in the exact same manner with respect to * * * preemptive effects").

Congress intended a broad scope for FAAAA preemption. Congress modeled the FAAAA on the preemption provision of the ADA, which preempted the enforcement of state laws "relating to rates, routes, or services of any air carrier having authority * * * to provide interstate air transportation." Pub. L. No. 95-504, § 4(a), 92 Stat. at 1708 (codified as amended at 49 U.S.C. § 41713(b)(1)). Based on the ordinary meaning of "relating to," as well as cases interpreting the "relates to" language of the similarly-worded ERISA preemption provision, this Court has held that "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted" by the ADA. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). When Congress used this same language in the FAAAA, Congress was aware of this interpretation and said that it "d[id] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755.[7]

---

[7] Subsequent to *Morales*, the broad interpretation of the "relates to" language in the ERISA preemption provision on which the *Morales* Court relied has been criticized. *See, e.g., California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (Supreme Court's "first take on [ERISA] was wrong"). Regardless of subsequent developments in ERISA preemption cases, however, Congress intended to incorporate into the FAAAA "the broad preemption interpretation" described in the *Morales* opinion. H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. Congress's choice to adopt *Morales* as the scope of FAAAA preemption must be honored, even if this Court ultimately determines that the scope of preemption recognized in *Morales* was too broad under ERISA or the ADA. In evaluating legislative intent, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was," even if "that understanding of Congress was in some ultimate sense incorrect." *Brown v. General Services Admin.*, 425 U.S. 820, 828 (1976). In all event, for the reasons discussed in the text, no matter what interpretation of the FAAAA is

(Continued on following page)

The FAAAA is clear about what is exempted from its preemptive force, specifying certain types of state laws, including those regarding: (1) safety with respect to motor vehicles; (2) highway route controls or limits based on size, weight, or hazardous materials; (3) insurance; and (4) household goods carriage (*i.e.*, transportation by specialized moving companies). *See* 49 U.S.C. § 41713(b)(4)(B); *United Parcel Serv., Inc. v. Flores-Galarza*, No. 03-1990, 2004 U.S. App. LEXIS 19370, at *7-*10 (1st Cir. Sept. 14, 2004).[6] Congress created no exception in the FAAAA for transportation of alcohol, and thus it clearly falls within the preemption provision. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (rejecting argument that exception to broad statutory language should be created because Congress did not expressly specify that particular matter would be covered by statute).

2. Michigan's Regulation Of Carriers' Deliveries Is Preempted By The FAAAA

a. The Michigan laws at issue in these cases, as well as the New York laws at issue in *Swedenburg*, are preempted by the FAAAA. The state laws proscribe delivery of alcohol to unauthorized recipients (*i.e.*, delivering alcohol in these States to anyone other than persons authorized by state law to receive them). But the delivery of alcohol is a carrier service that the FAAAA protects from state regulation.

---

applied, laws regulating whether and how carriers are permitted to make deliveries of alcoholic beverages are preempted.

[6] As amended, Section 601(c) regarding motor carriers contains the same exceptions and also excludes state regulation of the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle. *See* 49 U.S.C. § 14501(c)(2); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).

A carrier's delivery of the property it transports is a core part of the carrier's "service," which cannot be regulated by state or other local laws. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) (ADA preempts state law claim that relates to airline "'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates" arising from airline frequent flyer program); 49 U.S.C. § 13102(21)(B) (defining "transportation" for motor carriers to include "services related to [the movement of passengers or property], including * * * receipt, [and] delivery").

In an analogous situation, the First Circuit has held that the FAAAA preempts a Puerto Rico statute that "forbids delivery" to recipients who do not show the carrier proof that they have paid excise taxes on the transported goods. *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 335-336 (1st Cir. 2003). The court reasoned that "[c]ompliance with this provision significantly affects the timeliness and effectiveness of UPS's service, which includes the delivery of packages on an express or time-guaranteed basis." *Id.* at 336; *see also Tocher v. City of Santa Ana*, 219 F.3d 1040, 1047 (9th Cir. 2000) (FAAAA preempts municipal ordinances that imposed "operating requirements" that "directly influence the relationship between a customer and a [carrier]"), *cert. denied*, 531 U.S. 1146 (2001), *overruled on other grounds, City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).[9]

---

[9] *See also Soly v. United Parcel Serv., Inc.*, No. 02-CV-10499-MEL, 2002 U.S. Dist. LEXIS 24059, at *1-3 (D. Mass. Aug. 22, 2002) (claims arising from the delivery of packages "arise directly from core services provided by UPS, going to 'the heart of the "services" that UPS provides' "); *Rockwell v. United Parcel Serv., Inc.*, No. 99-CV-57, 1999 U.S. Dist. LEXIS 22036, at *7 (D. Vt. July 7, 1999) (claim regarding "package intake and delivery protocol is, beyond purview, inherently a claim against UPS's services which is also preempted"); *Forman v. Federal Express Corp.*, 753 N.Y.S.2d 348, 351-352 (N.Y. Civ. Ct. 2003) ("Plaintiff

(Continued on following page)

Moreover, the legislative history of the FAAAA confirms that Congress intended to preempt state laws that targeted carriers for special regulation based on the "types of commodities carried." H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758.

Michigan's effort to regulate the manner of delivery, *i.e.*, how carriers may make certain deliveries, is also clearly within the scope of the FAAAA's preemption clause. *See Flores-Galarza*, 318 F.3d at 336 (FAAAA preempts statutory scheme that "imposes extensive requirements that must be met before a carrier may make a lawful delivery").

b. The Michigan and New York laws relate not just to carriers' service, but also to their routes and prices. In order to comply with the laws, *amicus* CAA's members and other carriers must create special routing for the delivery of packages containing alcohol so that the packages can be segregated and trained personnel can perform the various tasks needed to ensure compliance. Non-complying packages must be re-routed to be returned to the shipper. In addition, carriers may have to alter delivery drivers' routes to account for the increased time drivers will spend on deliveries to assure themselves that packages containing alcohol are delivered only to authorized recipients. *See Flores-Galarza*, 318 F.3d at 336 (requirements that prohibit certain deliveries or permit them only after "extensive requirements" are met create a "substantial burden"

---

fails to demonstrate how the failure to deliver the contents of a package – arguably the principal service provided by Fed Ex – somehow does not relate to Fed Ex's 'services.'"); *cf. Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 394 (N.D. Tex. 1995) (plaintiff's claims were preempted because "the acts [plaintiff] complains of – preparation of the Waybill * * * and delivery of the package – are services" within the meaning of the ADA), *aff'd mem.*, 98 F.3d 1338 (5th Cir. 1996).

in the form of additional labor, costs, and delays, and "directly and significantly affect UPS's routes and services, which depend upon an orderly flow of packages").

The state laws also relate to carriers' rates because compliance can substantially increase the costs for carriers to transport and deliver goods due to the increased costs of identifying and processing packages containing alcohol. *See id.* at 336 (costs of a scheme that imposes requirements on delivery "necessarily have a negative effect" on prices); *Federal Express v. California PUC*, 936 F.2d 1075, 1078 (9th Cir. 1991) ("To regulate [terms of service] is to affect the price."), *cert. denied*, 504 U.S. 979 (1992). Because the Michigan and New York laws relate to carriers' prices, routes, and services, the FAAAA preempts these laws.

3. The Twenty-first Amendment Does Not Limit Congress's Authority To Enact Federal Statutes, Such As The FAAAA, Under Its Commerce Clause Authority

The FAAAA's preemption provisions protecting the ability of air, motor, and intermodal carriers to function in a national market without state law obstacles were enacted pursuant to Congress's power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, in conjunction with the Necessary and Proper Clause. *See* FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a), 108 Stat. at 1605 (statutory findings); *Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995) (upholding FAAAA as valid Commerce Clause legislation), *cert. denied*, 517 U.S. 1166 (1996); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 778-779 (2d Cir.) (same), *cert. denied*, 528 U.S. 868 (1999). Section 2 of the Twenty-first Amendment does not invalidate the FAAAA.

a. Shortly after the Twenty-first Amendment was ratified, this Court rejected the argument that the Amendment divested Congress of its preexisting authority over alcohol under Article I. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (*per curiam*), the Court considered a challenge to the Federal Alcohol Administration Act, which regulates importers, distillers, bottlers, and wholesalers of alcohol, including those shipping alcohol interstate. *See* Act of Aug. 29, 1935, ch. 814, tit. I, 49 Stat. 977 (currently codified at 27 U.S.C. § 201 *et seq.*). The federal statute was challenged on the ground that Congress had been divested of authority to regulate liquor under the Commerce Clause by the Twenty-first Amendment. This Court saw "no substance in this contention." 307 U.S. at 172-173.

At no point has this Court held that the Twenty-first Amendment insulates state laws or practices from the preemptive force of federal statutes enacted under the Commerce Clause. To the contrary, the Court has consistently rejected the view "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned. * * * Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

Thus, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and again in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), the Court held that the Sherman Act's broad language preempted state laws that required fixed prices for liquor. In both cases, the Court rejected the State's argument that the Twenty-first Amendment allowed the State to disregard federal law. *See Midcal*, 445 U.S. at 113-114; *Duffy*, 479 U.S. at 352.

Similarly, in *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), this Court held that a generally applicable federal agency regulation governing cable television preempted a state law that prohibited advertising of alcoholic beverages. The Court rejected the State's argument that the Twenty-first Amendment "rescue[s] the statute from pre-emption," explaining that, "[n]otwithstanding the Amendment's broad grant of power to the States * * * the Federal Government plainly retains authority under the Commerce Clause to regulate even * * * liquor." *Id.* at 712-713.

There is language in these cases that suggests the Court was seeking to "balance" or "harmonize" federal and state interests. *See Midcal*, 445 U.S. at 109; *Duffy*, 479 U.S. at 346; *Crisp*, 467 U.S. at 714, 716. But as the private petitioner in the instant cases acknowledges, "[i]n each case" in which "state alcohol regulations" were challenged as violations of "affirmative exercises of Congress's power under the Commerce Clause," "the federal power won." 03-1120 Pet. Br. 27. Indeed, the Court's "balance" of competing interests in cases such as *Midcal*, *Duffy*, and *Crisp* appears no different from standard application of the Supremacy Clause, in which the federal government must prevail. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

In *Crisp*, for example, the Court accepted that the state law was "designed to further the State's interest in discouraging consumption of intoxicating liquor" and was "a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State." *Id.* at 715. Yet the

Court unanimously held that "the Twenty-first Amendment does not save the [law] from pre-emption," because a federal regulation designed to ensure "diverse cable services" outweighed the State's interests. *Id.* at 715-716.

The *amicus* brief of 33 States in support of petitioners has reached this same conclusion, acknowledging that "when Congress speaks, the question is one of pre-emption under the Supremacy Clause." Br. of Ohio and 32 Other States as *Amici Curiae* 8. They explain that under this Court's cases, "Commerce Clause legislation enacted by Congress" is treated like "other constitutional limitations" with which States must comply without regard to the Twenty-first Amendment. *Id.* at 8-9.

Nor is there anything about applying the FAAAA's express preemption in the context of state laws directed at the delivery of alcohol that puts it beyond Congress's Commerce Clause authority. This Court has consistently suggested that efforts by States to regulate transportation of alcohol within their own borders can be preempted by affirmative federal law. *See United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 377 (1973) ("a State may, *in the absence of conflicting federal regulation*, properly exercise its police powers to regulate and control such [liquor] shipments during their passage through its territory" (emphasis added)); *North Dakota v. United States*, 495 U.S. 423, 439 (1990) (plurality) ("Congress has the power to confer immunity from state regulation on Government suppliers beyond that conferred by the Constitution alone, even when the state regulation is enacted pursuant to the State's powers under the Twenty-first Amendment." (citations omitted)).

Certainly, if, as in *Crisp*, a federal policy in favor of access to cable television can trump a State's interest in promoting temperance, then a federal policy in favor of

unfettered national commercial markets for the transportation of property likewise must supercede state laws that are seemingly motivated by a combination of temperance and economic protectionism. To hold otherwise would draw into question not only the FAAAA, but also other federal legislation.

For example, Congress recently enacted legislation designed to reduce the number of bulky packages that passengers carry onto airplanes now that greater precautions regarding air safety are in place. *See* 148 Cong. Rec. H6749 (daily ed. Sept. 26, 2002) (Rep. Gallegly). Congress mandated that, even though many States now forbid direct shipments of alcohol, it is lawful for consumers to receive direct shipments of wine if they purchase the wine on-site at a winery and could have carried it into their home State themselves. Specifically, Congress provided that "[d]uring any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State" if the consumer "could have carried the wine lawfully into the State * * * to which the wine is shipped." Pub. L. No. 107-273, Div. C, tit. I, subtit. A, § 11022, 116 Stat. 1758, 1829 (codified at 27 U.S.C. § 124). Congress intended that transportation by commercial carriers would be a substitute for consumers' bringing their winery purchases onto airplanes.[10] Any suggestion that Congress lacks the power to preempt state laws regulating direct shipments of wine under its Commerce

[10] The U.S. Postal Service is not an available alternative for such shipping because Congress has forbidden the mailing of alcohol. *See* 18 U.S.C. § 1716(f).

Clause authority would have the potential for interfering with a number of substantial national interests.

b. Michigan suggests that the legislative history of the Twenty-first Amendment indicates that many (if not all) of the opinions discussed above were wrongly decided. 03-1116 Pet Br. 20-21. In particular, Michigan argues, the omission of proposed Section 3 of the Amendment, which would have granted Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold," 76 Cong. Rec. 4138 (1933), *i.e.*, to regulate "saloons," reflects an intent to preclude any federal interference with state liquor regulation. But Congress's rejection of proposed Section 3 reflects no such intention. *See Duffy*, 479 U.S. at 347 n.10 (finding no "clear demonstration of congressional intent" to "confer on States complete and exclusive control of the commerce of liquor" in the debates surrounding the Amendment).

The debates around proposed Section 3 demonstrate that members of Congress were concerned about granting the federal government any new authority, particularly one that might continue the nationalization of criminal law that had occurred during the Prohibition era. *See* 76 Cong. Rec. 4141 (1933) (Sen. Blaine); *id.* at 4177-4178 (Sen. Black); *id.* at 4220 (Sen. Reed). There is no indication, however, that Congress intended to *limit* its own existing authority to regulate commerce pursuant to the Commerce Clause.

To the contrary, several Senators explained that they supported omitting Section 3 based in part on their understanding that Congress's existing authority to regulate liquor under the Commerce Clause was not affected. *See* 76 Cong. Rec. 4219 (1933) (Sen. Fletcher) ("I recognize, of course, that the Congress has power to regulate interstate commerce and to prohibit the movement of wet goods into dry States and that sort of thing. That is in the law now;

we do not need to express that in a new amendment to the Constitution."); *id.* at 4225 (Sen. Reed) (Congress "can prevent shipments into dry States; it can do that at present; it does not need any further grant of constitutional power for that."); *id.* at 4144 (Sen. Wagner) (Section 3 not needed "to restore the constitutional balance of power and authority in our Federal system which had been upset by national prohibition"). Thus, there is nothing in the history of the Twenty-first Amendment that suggests that Congress was deprived of its original authority under Article I to enact laws regulating interstate commerce merely because those laws regulate interstate transportation of alcohol.

B. State Laws That Regulate Deliveries Of Alcohol By Interstate Carriers Can Violate The Dormant Commerce Clause's Proscription Against Local Laws That Unduly Burden The Interstate Movement Of Goods

In addition to being preempted under the FAAAA, Michigan's laws are subject to review under the Constitution's Dormant Commerce Clause. "The negative or dormant implication of the Commerce Clause prohibits state * * * regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citations omitted).

Therefore, even if the Court were not to reach the FAAAA preemption argument, the judgment below should be affirmed on respondents' Dormant Commerce Clause discrimination argument. As respondents demonstrate, Michigan's laws should be declared unconstitutional because they discriminate on their face between goods

based solely on whether they originate from out-of-state and thus fall within the "virtually *per se* rule of invalidity" embodied in the Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Moreover, an undue burden argument should not be foreclosed in cases such as these involving state regulation of the delivery of alcohol.

1. The Twenty-first Amendment Does Not Authorize Enforcement Of State Laws That Otherwise Violate The Dormant Commerce Clause

Michigan and private petitioner argue that Section 2 of the Twenty-first Amendment automatically immunizes the state laws at issue in these cases from invalidity under the Dormant Commerce Clause, and appear to suggest that no state law enacted with regard to the transportation of alcohol can be invalidated, regardless of its discriminatory character or the burden imposed on interstate commerce.

But this Court has never adopted that view, recognizing that to do so would free States to adopt laws that would unduly burden interstate commerce in a manner that would harm citizens of the several States and the Nation as a whole. Indeed, as we discuss below, the current patchwork of state laws regulating the delivery of alcohol creates such harms.

Michigan and private petitioner all concede that in order for a state law to fall within Section 2 of the Twenty-first Amendment, the law must be an otherwise constitutional law. *See* 03-1116 Pet. Br. 31 ("Michigan does not contend that the 21st Amendment immunizes it from other provisions of the Constitution. This Court's decisions clearly indicate that it does not."); 03-1120 Pet. Br. 25 ("state regulation of beverage alcohol is of course subject * * * to the First Amendment and other provisions of the

Constitution"). Indeed, even state laws dealing with "importation," one of the matters expressly addressed by the text of Section 2, are subject to all of the Constitution's existing constraints. *See* 03-1116 Pet. Br. 26-27, 31-32 (citing with approval *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state taxation of liquor subject to Constitution's Export-Import Clause)); 03-1120 Pet. Br. 29 (same).

As this Court has held, there is nothing in the text of Section 2 of the Twenty-first Amendment that exempts state laws from Dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Healy v. Beer Inst.*, 491 U.S. 324, 341-342 (1989); *id.* at 344 (Scalia, J., concurring in part and concurring in judgment). Thus, under current precedent, state laws forbidding carriers from delivering alcohol and regulating the manner of delivery are subject to invalidation under the Dormant Commerce Clause. As respondents demonstrate, the Court should not retreat from these holdings, which are a proper interpretation of the Twenty-first Amendment and are entitled to respect as a matter of *stare decisis*.[11]

[11] Petitioners suggests that the Webb-Kenyon Act, 27 U.S.C. § 122, reflects Congress's intent to allow state laws that would otherwise violate the Dormant Commerce Clause. 03-1116 Pet. Br. 36-38; 03-1120 Pet. Br. 16-17. But there is nothing in that Act, just as there is nothing in the Twenty-first Amendment itself, that indicates that Congress intended to authorize discriminatory laws or laws placing undue burdens on instrumentalities of interstate commerce when the burdens outweigh any purported local interest. Indeed, in light of the FAAAA and 27 U.S.C. § 124, the Webb-Kenyon Act simply cannot be understood to sanction all state laws regulating transportation of alcohol.

2. State Laws Regulating Deliveries Of Alcohol Impede The Development And Functioning Of A National Market, And May Place An Undue Burden On Interstate Movement Of Goods

The parties in these cases have focused on the state laws' facial discrimination in their treatment of in-state and out-of-state sellers. As respondents explain, the laws at issue in these cases violate fundamental tenets of the Dormant Commerce Clause by discriminating against interstate commerce in favor of local industry and intrastate transportation.

Even if this Court were to reject respondents' claims of unconstitutional discriminatory treatment, however, serious questions would remain open for future litigation concerning the constitutionality of the burden that these laws, viewed in the aggregate, impose on interstate carriers under the Dormant Commerce Clause. The validity of the Michigan provisions regulating carriers was not litigated on this theory and thus there are not facts in the record to establish the full extent of the burden on interstate commerce. Yet there are strong indications that enforcement of these laws against carriers may be contrary to the constitutional principle against economic balkanization reflected in the Commerce Clause. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

a. More than a century ago, this Court held that the Commerce Clause by its own force proscribes state regulation of the "transportation of passengers or merchandise through a State, or from one State to another" when there is a threat that "commercial intercourse between States remote from each other may be destroyed." *Case of State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-280 (1873); *see also Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*,

223 U.S. 70, 82-83 (1912) ("it is not competent for any State to forbid any common carrier to transport" any commodity that is the "legitimate subject of interstate commerce" because such regulation would be "an unlawful regulation of interstate commerce not authorized by the police power of the State").

Direct regulation by States regarding the transportation of alcohol creates precisely the kind of "oppressive" burden on interstate carriers that led this Court in *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), to hold that the Dormant Commerce Clause proscribed state regulation of the intrastate conduct of interstate carriers. The Court reasoned that, "if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to." *Id.* at 572.

The Court has reaffirmed, time and again, that early understanding of the practical effect of diverse local regulation on interstate commerce in cases involving transportation of persons and property by interstate carriers. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

The factual conclusion in those cases that many state laws regulating carriers unduly interfered with interstate commerce received the express endorsement of Congress in the enactment of the FAAAA. As noted above, Congress found, similar to this Court's determinations in *Wabash*

and its progeny, that diverse state regulation of carriers "impose[s] an unreasonable burden on interstate commerce * * * [and] impede[s] the free flow of trade, traffic, and transportation of interstate commerce." Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. at 1605.

b. Many States regulate not just sellers and buyers of alcohol, but also *carriers*, making it unlawful (and criminal) for carriers to deliver alcohol to certain recipients or otherwise make deliveries that do not conform to state law. For example, many States, including Michigan and New York, forbid carriers from making certain deliveries of alcohol either to unauthorized recipients or from unlicensed shippers. The specific regulations vary, however, from State to State. *See, e.g.*, Alaska Stat. § 04.11.499 (forbidding any person from transporting alcoholic beverages into certain communities); Colo. Rev. Stat. § 12-47-901(l) (permitting deliveries only if the shipper is licensed in Colorado); Fla. Stat. ch. 561.545(2) (making it unlawful to knowingly and intentionally transport any alcoholic beverage from out-of-state to anyone other than a licensed recipient, registered exporter, or state-bonded warehouse); Me. Rev. Stat. Ann. tit. 28, § 2077-B (forbidding the delivery of liquor from an out-of-state company by mail order); Mich. Comp. Laws § 436.1203(1) (forbidding the delivery of alcoholic liquor unless it is made by the State or State licensees); Miss. Code Ann. § 27-71-315 (forbidding deliveries of beer and light wines to anyone other than licensed wholesalers and distributors); N.H. Rev. Stat. Ann. § 178:27(II) (forbidding carriers from shipping into certain areas of the State); N.Y. Alco. Bev. Cont. § 102(d) (permitting deliveries only to consignees who are licensed); Tenn. Code Ann. § 57-3-402(b) (forbidding the delivery of alcohol unless it is to a licensed manufacturer, wholesaler, or certain other authorized recipients).

Such laws can impede the flow of interstate commerce because they disrupt carriers' operations, increase costs, and slow service. As a result, carriers cannot employ uniform procedures for handling and transporting property nationwide. The resulting inefficiencies and delays caused by such state laws may constitute an undue burden on interstate commerce in violation of the Commerce Clause that could not be sustained unless supported by important state interests that justify the burden. *See Raymond Motor Transp.*, 434 U.S. at 440-441 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Dormant Commerce Clause serves a fundamental purpose in making the United States the world's largest single economic market, a market in which interstate carriers of property play a critical role. This Court should not adopt a rule that any state law relating to alcohol, regardless of its discriminatory character or direct burden on interstate carriers, would be completely immune from any judicial scrutiny under the Dormant Commerce Clause. Nothing in the Twenty-first Amendment requires this Court to sanction unlimited balkanization of that national market when the product being carried is alcohol.

CONCLUSION

For the reasons set forth above and in the respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DREW S. DAYS, III
Counsel of Record
BETH S. BRINKMANN
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

Of Counsel

STEPHEN A. ALTERMAN
MYERS & ALTERMAN
1220 19th Street, NW
Washington, DC 20036

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

Counsel for Amicus Curiae

SEPTEMBER 23, 2004